themselves before they went to the lifts, and they were never informed by the reception desk first before their guests went up to their rooms. He said that the swimming pool was on the fourth floor and people were free to go into the lifts without any check by any security officer; similarly, there was access to the lifts at the mezzanine floor and there was no check there also. This evidence does show that unauthorised persons could easily gain access to the lifts and go to any floor of the Hotel without being checked or stopped by a security officer. DW 2's exaggerated claim that the Hotel maintained the "highest standard in terms of security" is wholly unsustainable. I find that his evidence on the security arrangement unreliable.

In the result the plaintiffs have succeeded in establishing their claims against the defendants, and I order that interlocutory judgment be entered against the defendants with damages to be assessed by the Registrar. I also order that the defendants pay to the plaintiffs the costs of and incidental to this action and the assessment of damages.

On the assessment of damages, I think I ought to clarify one point. As I have said earlier, there was no dispute that the plaintiffs had lost the items of jewellery and the small amount of cash as claimed. During the trial, counsel for the defendants had cross-examined the 1st plaintiff specifically on each of the items of jewellery, and at no time was there any suggestion made that any of the items had not been lost as a result of the theft. The assessment of damages therefore is to be confined mainly to determining the value of the items of jewellery.

Claim allowed.

Solicitors: *Rodyk & Davidson; Y.M. Jumabhoy & Co.; Lim & Gopalan.*

A MALAYSIAN REPORTS

MUSTAK AHMED BIN DATO' HAJI ABDUL RAHIM GULAM RASOOL SHAIK v. ABDUL WAHID BIN DATO' HAJI ABDUL RAHIM GULAM RASOOL SHAIK & ORS. SHAFIAH BIBI BINTI IBRAHIM MYSOORY & ORS. v. ABDUL WAHID BIN DATO' HAJI ABDUL GULAM RASOOL SHAIK & ORS.

[S.C. (Wan Suleiman, Hashim Yeop A. Sani & Syed Agil Barakbah S.C.JJ.) September 9 & 10, 1986 & June 10, 1987]

[Kota Bharu – Supreme Court Civil Appeals No. 215 and 276 of 1985]

Islamic Law – Gift – Transfer of shares in match factory – Whether donor suffering from marz-ul-maut- Reasonable probability of death.

This was an appeal from the decision of the High Court reported at [1986] 2 M.L.J. 211. The respondents had brought an action to invalidate the transfer of shares in a match factory at an undervalue by Dato Haji Abdul Rahim Gulam Rasool Shaik (since deceased) to four of his children. It was argued in the High Court that the transfers were void under the doctrine of *marz-ul-maut*. The learned trial judge concluded that the transfers of the shares were void under the doctrine and gave judgment to the respondents as prayed. The appellants appealed.

Held, allowing the appeal: (1) the deceased was not under the apprehension of imminent death at the time he made the gifts to his four children, the illness did not incapacitate him for the pursuit of his ordinary avocations, and although the illness continued for less than a year, the facts and circumstances formed sufficient length of time to remove or lessen from his mind the apprehension of immediate death;

(2) the gift by transfer of shares to the four children was not caught by the doctrine of *marz-ul-maut* and was therefore valid under the Shariah laws.

Cases referred to:

(1) *Ibrahim Goolam Ariff* v. *Saiboo* 34 I.A. 167.
(2) *Shamshad Ali Shah* v. *Syed Hassan Shah* P.L.D. 1964 S.C. 143.
(3) *Chanan Bibi* v. *Mohd Shafi* P.L.D. 1977 S.C. 28, 34-36.
(4) *Safia Begum* v. *Abdul Rajak* A.I.R. 1945 Bom. 438.
(5) *Abdul Hafiz Beg* v. *Sahebbi* A.I.R. 1975 Bom. 165.

SUPREME COURT.

Dato H.L. Wrigglesworth for the appellant in S.C.C.A. 215/85.

C.H. Liew for the appellants in S.C.C.A. 276/85.

Varghese George for the respondents.

Cur. Adv. Vult.

Syed Agil Barakbah S.C.J. (delivering the Judgment of the Court): This is an appeal against the decision of the learned Judge of the High Court, Kota Bharu, who gave judgment in favour of the respondents/plaintiffs in the two civil actions which were heard together pursuant to a Court Order for consolidation (the first suit and the second suit, respectively). The appellants and the respondents are the beneficiaries of the estate of the late Dato' Haji Abdul Rahim bin Gulam Rasool Shaik (hereinafter called "the deceased"). The first respondent in both suits and the first appellant in the first suit are the co-administrators of the estate. It was common ground that in his lifetime the deceased was a successful businessman and the managing director of the Kelantan Match Factory Limited, Kota Bharu (the Match Factory), of which he owned 300 shares. He had two wives, Aishah Bibi who bore him three children, and Safia Bibi the first appellant and the joint administrator of the estate. The former, who survived the deceased, was domiciled in India but died before the suits were heard. The latter is domiciled in Kelantan and bore him eleven children (see page 278 of Record of Appeal Part C). The deceased, all the parties in both suits and the other beneficiaries to the estate profess and practise the Islamic religion and belong to the Hanafi school of the Sunni Sect.

The two suits arose because of the transfer made by the deceased of 298 of his 300 shares in the Kelantan Match Factory to four of his children. Prior to the said transfer, the deceased was admitted to hospital in Singapore on September 29, 1966. It was discovered that he had lung cancer. He was discharged on October 8, 1966. Immediately on his return on October 9, 1966, and October 11, 1966, he effected the transfers. For ease of reference, the original shareholders were:

(1) The deceased	–	300 shares
(2) Safia Bibi binti Ibrahim Mysoory (The first appellant in the second suit)	–	100 shares
(3) Khalid Abdul Rahim Shaik	–	50 shares
(4) Mustak Ahmad Abdul Rahim Shaik (Appellant in the first suit)	–	50 shares
Total:		500 shares

After the transfer, the following were the shareholders:

(1) The deceased	–	1 share
(2) Safia Bibi	–	100 shares
(3) Khalid Abdul Rahim Shaik	–	100 shares
(4) Mustak Ahmad Abdul Rahim Shaik	–	100 shares
(5) Gulam Rasool Abdul Rahim Shaik	–	100 shares
(6) Mohamed Iqbal Abdul Rahim Shaik	–	98 shares
(7) Yacoob Ahmad Kathrada	–	1 share
Total:		500 shares

(See Statement of Agreed Facts on pages 155 and 156 of the Record of Appeal Part B). It is to be noted that 50 shares each were transferred to Khalid and Mustak Ahmad in addition to their original shares while the transfers to Gulam Rasool and Mohamed Iqbal were 100 shares and 98 shares, respectively. The deceased transferred one share to Yacoob and retained one share to himself. Each share was valued by the deceased at $1,000/–. Khalid and Mustak withdrew $50,000/– each from their dividends in the match factory to pay the deceased for their shares. For the shares transferred to Gulam Rasool and Mohamed Iqbal, Safia Bibi issued her own cheque in the sum of $198,000/– in favour of the deceased. Both cheques were dated October 8, 1966, the day the deceased was discharged from hospital in Singapore. The learned trial Judge noted that there was urgency in the withdrawal of the money since the first respondent has to resort to an overdraft facility to pay the deceased, and that the deceased had received the sum of $298,000/– for the sale of 298 of his shares in the Kelantan Match Factory Limited at $1,000/– per share. That was evidenced by the bank statements and the Estate Duty Questionnaires and assessment exhibited in the record.

Some time in October 1966, the deceased flew to the United Kingdom to see a Consultant. After receiving treatment, he returned in December of that year. He died of cancer on May 3, 1967, about four months later and after being bedridden for four to five weeks and about seven months after the transfer of his shares.

In their amended Statement of Claim, the respondents raised objection to the transfer of

the 298 shares by the deceased to his four children on the ground that the deceased was fully aware that his health was deteriorating and he was suffering from one or more of incurable diseases including cancer and being fully aware of the nature and consequences of such diseases that death would ensue as a result. They alleged that the transfers were null and void according to the Muslim Law doctrine of *Marz-ul-Maut* (death-sickness).

The learned Judge was of the view that the doctrine could be applied since the deceased, his wife and children are Sunni Muslims of the Hanafi Sect. He based his findings on the principles found in the textbook by *N.J. Coulson* on Succession in the Muslim Family. After going through the relevant facts and surrounding circumstances, he said:

"On the evidence I can only conclude that the deceased having known that he had cancer, and being aware that cancer was a very serious illness, believed that his death was imminent, and in contemplation of his death he had taken immediate action to transfer 298 of his 300 shares in Kelantan Match Factory to four of his sons without the consent of the other heirs to his estate."

He also made a further finding:

"On the evidence, my finding is that there was no improvement in the health of the deceased. In fact his health continued to deteriorate till his death. I therefore find that when the deceased knew he had cancer, he was under apprehension of imminent death and that nothing had happened to him that would interrupt such apprehension from his mind until he died.

I also find that the deceased had transferred 298 of his 300 shares in Kelantan Match Factory Limited to the defendants to prevent the three plaintiffs who are his heirs, from making any claim to those shares upon his death. It is also a fact that the plaintiffs had never given their consent to the deceased to transfer those shares to the four defendants."

The learned Judge concluded that the transfers of the 298 shares to the appellants were void under the doctrine and gave judgment to the respondents as prayed. It is against that decision that the appellants have not appealed.

Before touching on the grounds of appeal, it is necessary at this stage to explain the meaning and object of the doctrine of *Marz-ul-Maut* in Islamic Law. An adult Muslim in his lifetime may deal with his property without any restraint. He is blessed when he bears in mind that such property is a trust upon him given by God and that he uses and expends it for lawful purposes in accordance with the teachings of God. He may give any of his property by way of charity or by way of gifts. He is bound however to pay part of his property annually on account of the zakat which is obligatory. Under Muslim Law, a man may lawfully make a gift of his property during his lifetime so long as three conditions are fulfilled *viz.* (i) a manifestation of the wish to give on the part of the donor (ii) the express or implied acceptance of the gift by the donee and (iii) the taking of possession of the subject-matter of the gift by the donee either actually or constructively. That is the view of *Ameer Ali* which is based on the Hedaya of Al-Marghinani, the standard text and one of the most celebrated treatises in the Hanafi School. The Holy Prophet Muhammad (s.a.w.) encourages Muslims to make gifts by saying "send presents to each other for the increase of your love." There is, however, certain restraint upon a Muslim in the alienation of the property that relates to wills and death-bed gifts. There is no lack of authorities dealing with the statement of the law and principles relating to *Marz-ul-Maut* or "illness of death" as seen from the dissertation of Professor Tan Sri Datuk Ahmad Ibrahim, the Shaikh Kulliyyah of Laws at the International Islamic University, Kuala Lumpur which Dato Wrigglesworth, the learned counsel for the appellants, has sought and included in his written submission to us. Indeed, the learned Professor has quoted numerous texts from well-known Muslim jurists and judicial decisions of the Courts in India and Pakistan. We find his works to be useful as guidance. In our view, a clear definition of the doctrine is as provided in the *Majelle* or the Islamic Code produced in Turkey between 1869 and 1876. The Code was published almost at the same time with *Majallah-e-Ahkam-e-Adliah* (code of jurisprudence) which was a codification of Islamic Laws compiled under the auspices of the Ottoman rulers by a committee of seven top ranking Ulama and which was finalised in 1876 (1293 A.H.). The Code says:

"Marz-ul-Maut (mortal sickness) is the kind of sickness, such that in the condition of the sick person there has generally been fear of death for him, and the sick person being unable to attend to his business, if he is a man, his business outside the house, if she is a woman, her business inside the house, has died before a year has passed on account of his condition, whether the person has been confined to his death-bed or not. And if when the illness of a sick person is prolonged, one year passes, while he is always in one state, unless the illness of the sick person gets worse and his state is changed, he is like a man who is well, and his transactions are like the transactions of a man who is well.

But if his illness gets worse and his state changes and he dies before a year passes, his state until he dies, calculating from the time of change, is mortal sickness."

In another translation the passage in the *Majelle* reads:

"A mortal sickness is that sickness which on the one hand brings with it for the most part the fear of death and on the other part hinders the sick person, if he be a man from seeing to his business outside the house and if she be a woman the business inside the house and ends in death before a whole year has passed after the sick man come to this state.

It is not to be taken into consideration whether a sick person is confined to his bed or not; but if the condition of the sick person extends for more than a year, continuing always the same, the sick person is considered as in health so long as his sickness does not change for the worse and all his acts are considered as those of a healthy man. If however, his sickness changes for the worse, and the sick man dies before a whole year has elapsed, the condition in which he continued to be from the day on which his sickness began to get worse until his death is considered as a death sickness."

The statement that an illness which has lasted for over a year ceases to be regarded as *Marz-ul-Maut* does not lay down a rule of law, it only gives expression to the general doctrine that a long continued illness unattended with any circumstances of aggravation as is likely to cause apprehension of death, is not to be treated in its effect as a "fatal malady." Where, however, the disease is long-standing but becomes suddenly aggravated and the patient becomes confined to his bed "it would be like a new illness," that is, it would be taken as likely to create a fear of death in the mind of the sufferer, and his acts in that state, would, therefore, in case of death from the illness, take effect with respect to a third. [*Radd-ul-Muhtar,* by Mohammed Amin, Vol. 5, page 648].

In order to constitute the proper test for the application of the doctrine, certain conditions have to be determined. The principles enunciated in the most authoritative Hanafi works show that in determining whether *Marz-ul-Maut* applied, several questions have to be considered. The Courts in India and Pakistan have accepted the following criteria:

(1) Was the donor suffering at the time of the gift from a disease which was the immediate cause of his death?

(2) Was the disease of such a nature or character as to induce in the person suffering the belief that death would be caused thereby or to engender in him the apprehension of death?

(3) Was the illness such as to incapacitate him for the pursuit of his ordinary avocations – a circumstance which might create in the mind of the sufferer an apprehension of death?

(4) Had the illness continued for such a length of time as to remove or lessen the apprehension of of immediate fatality or to accustom the sufferer to the malady.

[See *Ibrahim Goolam Ariff* v. *Saiboo*[1], *Shamshad Ali Shah* v. *Syed Hassan Shah*[2] and *Chanan Bibi* v. *Mohd Shafi*[3]].

It should be noted that the Hanafi school applies the subjective test and not the objective test as applied by the Shafie and the Hambali schools of law. That is apparent from the second condition stated above which requires some degree of subjective apprehension in the mind of the sick person, and also in the third condition which requires some external indicia as to incapacitate him from attending to his ordinary avocations. The facts and surrounding circumstances of each case including the physical and psychical condition of the person afflicted, the nature of the malady and the proximity of death to the actual act of disposition and further the fact of death, have to be considered by the Court to determine whether the disposition is caught within the ambit of the doctrine. If there is probability there was some degree of the subjective apprehension of death in the mind of the ailing person who eventually died suffering from his last illness, the subjective test implicit in the doctrine is satisfied both in principle and policy. There is of course no objection to medical evidence which may be available with the growth of medical and psychological sciences in the modern times to be admitted in support of the test, apart from persons who were near the deceased during the relevant period of illness and from relevant documentary evidence available.

The onus of proving the requirements of the doctrine is on the person who sets up the plea (see *Safia Begum* v. *Abdul Rajak*[4] and *Abdul Hafiz Beg* v. *Sahebbi*[5]). On the other hand, the school of law which is followed in Malaysia, prefers the objective approach.

In this respect the *Minhaj-et-Talibin* translated by E.C. Howard, late District Judge, Singapore, London (1941), at page 262, by the great jurist Imam Nawawi refers to the doctrine of *Marz-ul-Maut* thus:

"A person who becomes so ill as to be in danger of death may no longer dispose of his property for nothing to a greater amount than one-third; but should he against all hope recover, these dispositions cannot be invalidated. A sick person, not in any danger, may freely dispose of his property; and even if he unexpectedly dies during this sickness, his dispositions have all the same their full legal

effect. This is not the case where death is caused by the malady in question, even though the latter may not be regarded as of a dangerous nature, for then it is manifested to be really dangerous. In case of uncertainty as to the character of the malady, it should be ascertained by two doctors, free men of irreproachable character."

In the present case, however, since the deceased lived and practised as a Muslim of the Hanafi sect it is in our view appropriate that the subjective test accepted by the Hanafi school of law should apply to the present case. As a matter of fact, the amended statement of claim manifests a similar approach and the learned Judge's findings appear to be based on the subjective test though not in its totality as required under the four principles. This aspect is discussed later.

What is the effect of the gift if the doctrine is proved to be applicable? According to *Ameer Ali's* Mohammedan Law, Volume 1, Calcutta 1912, it is stated, *inter alia,* that a gift made by a person suffering from *Marz-ul-Maut* takes effect in respect of one-third of his estate and when made in favour of an heir, it is altogether inoperative unless it is assented to by the other heirs.

It is ordained in the Holy Quran that no one should make legacies "so as to cause loss to their heirs." Surah *An Nisaa*(4): 12-13 lays down in broad outline the principles of inheritance. The power of testamentary disposition extends over only one-third of the property and the remaining two-thirds are distributed among heirs as laid down. Legacies cannot be left to any of the heirs who are included in the scheme of distribution. Debts including funeral expenses and legacies take precedent on the estate of the deceased before distribution to the heirs which has to be calculated with fairness in accordance with principles laid down. In view of the above no bequest can be made to an heir. (*The Holy Quran,* Text, Translation and Commentary by A. Yusuf Ali). In this respect the Holy Messenger of Allah (s.a.w.) said "Allah has appointed for everyone who has a right what is due to him and no bequest must be made to an heir." (*Sunan Abu Dawud* "Kitab al Wasaya" vol. 2 p. 808).

The main ground of appeal was that the learned trial Judge erred in his finding that the deceased knew he was suffering from cancer when he transferred his shares in the Match Factory to his four sons. Knowledge by the deceased that he was suffering from a mortal sickness which raises a fear of imminent death at the time when he makes the gift is an essential ingredient of the doctrine. It was submitted that the learned Judge relied on the oral testimony of the two doctors who treated the deceased *viz.* Dr. Lim Cheng Hong, a physician attached to the Singapore General Hospital (P.W.1), and Dr. Ezanee Merican, a private practitioner in Kota Bharu, Kelantan (P.W. 2), that they informed the deceased that he had cancer and that the Judge had failed to consider relevant documentary evidence in the form of correspondence between Dr. Merican and two other doctors which, it was argued, would show that the deceased was not informed and therefore was not aware at the time of making the gifts that he was suffering from "carcinoma" or cancer. It was common ground that the deceased was suffering from tuberculosis (TB) in the earlier period and was being attended to by Dr. Merican, the family doctor, whose father was an old friend of the deceased. In September 1966 when the deceased complained of blood in his sputum, Dr. Merican referred him to Dr. Lim in Singapore thinking that his TB had reactivated. After the deceased was admitted in Singapore General Hospital for treatment, it was diagnosed that he had a malignant cancer of the right lung. Dr. Lim informed Dr. Merican by telephone. According to Dr. Lim, he had to tell the patient he had cancer because he required radiotherapy treatment and recommended that he be referred to a Dr. H.C. Ho in Hong Kong who was a specialist in the treatment of that type of cancer. Dr. Merican also had to tell the deceased after his return from Singapore that he had cancer since he was suggesting to him to go for radiotherapy treatment in U.K. We observed that none of the three letters except for the third, expressly mention about the deceased suffering from cancer, but that, in our view, could safely be implied. The letter from Professor Sir Brian Windeyer, Mount Vernon Hospital, Middlesex, England, dated December 22, 1966 to Dr. Chia Kim Boon, Radiotherapy Department, General Hospital, Singapore, who also treated the deceased earlier, and which was copied to Dr. Merican states, *inter alia,* that the deceased had completed his course of treatment and would be returning home on December 19, that he was also attended to by a Dr. Scadding for his T.B. There was nothing for the present that could be done for him in particular except to continue with his T.B. drugs. Dr. Merican wrote to the Professor on December 22, 1966, referring to the first letter and inquiring about the names of the drugs for T.B. which the patient had brought home. The last paragraph of this letter is, in our view, vital. It says:

"There is one other thing. The patient himself now believes he has only a reactivation of his old tuberculosis condition. His immediate family who know the truth would like to have some indication of the final prognosis. I have to face these questions from them and may be one day from the patient himself when he realises the truth. Could you give me your opinion of his present expectation of life, based on your vast experience of such cases? I would be most grateful if you would do me this favour." (See page 281 Part C of Appeal Record).

The reply in the Professor's letter dated January 19, 1967 with regard to the above questionnaire reads:

"With regard to the prognosis of the carcinoma of the bronchus, obviously the prognosis here with a squamous cell carcinoma arising in a lung already the seat of active Tuberculosis, must be a very poor one. I think that objectively we must realise that the radiotherapy is only to be of a palliative nature and that within a relatively short period of months it is likely that he will get re-activation of his disease.

It is impossible to give any sort of accurate prognosis of his life expectancy as to whether this is going to be measured in months or years."
(See page 282 of Appeal Record Part C.).

From these correspondence, there appears to be no doubt that the patient was sent to Mount Vernon Hospital, Middlesex, for the treatment of both cancer and tuberculosis. The patient knew he was having tuberculosis. Would the Judge change his mind if he had considered the correspondence *vis-a-vis* the evidence of Dr. Lim and Dr. Merican of having told the deceased earlier that he was also having cancer? Dr. Merican was subjected to cross-examination on the letters and explained what he meant in his letter that the patient knew he had cancer but preferred to believe that he was having a reactivation of his tuberculosis. The letter was written after the deceased's return from U.K. The Professor's letter indicated that nothing else could be done for the cancer and it was a matter of time that the patient might succumb to the disease, although he was unable to give a final prognosis. According to Dr. Merican, the deceased's close family knew of his poor condition but not the patient who might one day know it too when he realised his condition had deteriorated. Dr. Merican was concerned that he had to face and answer the question from the deceased himself. That is how we understand by the letter. It does not dispel the fact that Dr. Merican informed the deceased that he had cancer. We observe from the record that Dr. Merican had discussion with the deceased "after September 1966" about having treatment overseas either in Hong Kong or the United Kingdom. That was after the deceased had returned from Singapore General Hospital and Dr. Merican had to tell him that he had cancer since he suggested to him to go for radiotherapy treatment overseas. The deceased transferred his shares to his four children earlier, *i.e.* immediately on his return from Singapore on October 9, 1966, and October 11, 1966, respectively. The crucial point relating to the knowledge of the deceased under the doctrine is that he had cancer must be immediately prior to or at the time he made the gifts. The whole matter that we have discussed in relation to Dr. Merican, seemed to be that he could have informed the deceased that he had cancer well after the deceased had made the gifts. As we have pointed out earlier, Dr. Merican was told about it through the phone by Dr. Lim when the deceased was still in Singapore General Hospital. The correspondence with Professor Sir Brian Windeyer took place much later after the deceased had returned from U.K. In the result, the information by Dr. Merican to the deceased about him having cancer is rendered irrelevant in point of time. That leaves Dr. Lim's testimony. This was a question of fact for the learned Judge to consider. He accepted the evidence of the said doctor and concluded that while being hospitalised in General Hospital Singapore between September 29, 1966, until his discharge on October 8, 1966, the deceased was told that he had cancer of the lung. Although that happened seventeen years before the date of hearing, Dr. Lim's testimony in this respect to a certain extent is supported by his report to the Medical Superintendent, General Hospital, Singapore, dated November 17, 1973, at paragraph (2) "The deceased was informed of the gravity of his condition but no specific prognosis as to the length of survival was spelled out to him as far as I can remember." (See page 294 of Appeal Record, Part C). He also informed Dr. Merican about it and the latter followed up by informing the deceased. The fact that he agreed to go for further treatment in U.K. tends to strengthen the learned Judge's view that the deceased knew or would have known in all the circumstances of the case, he was suffering from cancer. We agree with the learned Judge insofar as knowledge by the deceased that he was suffering from cancer as there is some evidence to support that conclusion. However we do not agree with the learned Judge's conclusion that the deceased believed that his death was imminent.

In considering the essential ingredient that the malady was of such a nature or character as to induce the donor the apprehension of imminent death, the learned Judge applied the Anglo-

Muhammadan Law in examining the evidence to determine the state of mind of the deceased at the material time. Having considered the sequence of events from the facts and circumstances of the case including the transfer of the shares by the deceased to his children at a much undervalued price and done rather in great hurry, he concluded that the most probable inference that arose from the conduct of the deceased was that he knew he was having cancer, and being aware that cancer is a very serious illness, believed that his death was imminent and in contemplation of death, he transferred the said shares to his four sons without the consent of the other heirs. The Judge also went on to consider whether his health had improved thereafter and found from the relevant evidence that the health of the deceased progressively deteriorated and continued to do so until his death. Lastly, he also made a finding that the deceased transferred the shares to prevent the three respondents who are also his heirs from making any claim of those shares upon his death.

In his judgment the learned Judge alluded to Anglo-Muhammadan Law as being a source of authority. It is clear to us that Anglo-Muhammadan Law is not pure Shariah Law. *Fyzee* in his Introduction of Cases in the Muhammadan Law of India and Pakistan has this to say:

"Thus the system known as 'Muhammadan law" in India and Pakistan is the shariat, as modified by English law, both common and statutory, and Equity, in the varying social and cultural conditions of the subcontinent. While in essence the sources of Muhammadan law are the same as those of Islamic countries all over the world, in India and Pakistan Muhammadan law has tended to become a discrete system, somewhat at variance with its original formulations.

... By Islamic law is meant the shariat or fiqh in its pristine purity. Now it is well known the shariat in its pure and undiluted form has never been enforced in India and Pakistan, and it is doubtful if it can be administered as law in the twentieth century. Muhammadan law, an expression introduced by European scholars and lawyers, is therefore a convenient expression for that portion of Islamic civil law which is applied in the subcontinent to the adherents of Islam as a personal law."

The laws applicable in our country relating to the Muslim law of succession, gifts, will and the the like are the Shariah laws. As enshrined in our Constitution, the official religion of Malaysia is Islam of the Shafie sect from the school of Ahli Sunnah Wal Jamaah (Sunnis). However, the application of the doctrines of the sects other than Shafie in relation to similar matters involving Muslims of the respective sects are not prohibited.

With regard to the question whether the malady was such a character as to induce the donor the apprehension of imminent death, the undisputed facts and surrounding circumstances of the case show, in our view, that it was not so. At the material time, the deceased was about sixty years of age. He had two wives and fourteen children, *viz.* five sons and nine daughters. The first wife lived in India with the second and the third respondents while the first respondent lived in Australia. The other wife, four sons and seven daughters lived in Malaysia. About five years prior to his death, he was medically certified to be suffering from T.B. and was undergoing treatment with Dr. Merican. It was well-known that T.B. was a killer disease prior to and during the Second World War, but thereafter as a result of advanced medical science it has ceased to be so and is now curable. The discovery by the deceased that he was having T.B. would not therefore cause as much anxiety and concern than the later discovery of having cancer. Be that as it may, it seemed that the deceased had made gifts of his property prior to his knowledge of suffering from cancer. Before his pilgrimage to Mecca on March, 19 1966, he made a will and on the same day made substantial gifts of his property in India to his son and two daughters, the respondents. Between March and May 1966, the deceased also made substantial gifts of shares of public companies to his Malaysian wife and daughters. Way back in 1930, he purchased for the first respondent property comprising of a row of shophouses and four apartments in Surat, India and since the first respondent was then still a minor, his mother was appointed his trustee. It was on October 9 and 10, 1966, that he transferred his shares in dispute to his four sons. On October 18, 1966, he made his last will. That was prior to the deceased going to U.K. for medical treatment. As stated earlier, he returned to Malaysia in December 1966. On his return, he was observed to have improved much in health. According to Dr. Merican, the deceased told him that he was feeling much better after the medical treatment he had received in U.K. His wife (D.W.1) testified that on his return his health was much better, he started to put on some weight, was happy and expected to be cured. Similarly, his daughter (D.W.5) observed her father was putting on weight and he told the children that everything would be alright.

It should also be observed that the deceased made gifts on two occasions prior to going on a journey, *viz.* first, before his pilgrimage to Mecca and, secondly, before his journey to U.K. for treat-

ment. It is also important to note that he went to U.K. alone without being accompanied by any relative, as would be expected in serious illness of that nature. There was no question of financial hardship since he was a very well-to-do man.

The making of wills and gifts is encouraged by the Holy Quran and the Sunnah of the Holy Prophet, the two principal laws of the Shariah. We noted that the deceased was a devout Muslim in his lifetime, having contributed the annual payment of zakat to the State Government of his property and income. We would accept the submission relating to the observation of the deceased by Dr. Merican, who had been treating him for a long time and who admitted in evidence of being a cancer patient himself, that the deceased was a strong-willed and intensely practical man and appeared to be calm in his illness. He wanted to put his affairs in order and was keen to go for treatment as soon as possible.

On his return from U.K., he still continued to manage the running of the match factory which was not far from his house, he was able to carry out the pursuit of ordinary avocations and there was no evidence to indicate that he was unable to perform his prayers five times a day or compelled to do so while sitting down instead of standing in the ordinary way. On the contrary, the evidence pointed to his ability to carry out all the normal functions until only about five weeks before his death that he became bedridden. He passed away about seven months after making the gifts. During that period, apart from what has been said earlier, he had also written letters to friends overseas well indicating his belief of recovery. That, in our view, tends to lessen his apprehension of immediate fatality. On December 29, 1966, he wrote a reply letter to Mr. Matsumara of Japan informing him of his illness and of his intention to visit Japan as soon as he felt strong again. Both had common interest in running match factories and the deceased's intention to visit Japan was to see the new machines at work. Later in February 1967 and March 6, 1967, he wrote letters to the Danish Ambassador regarding the repairs to his house in Kuala Lumpur which appeared to be occupied by the Ambassador as tenant informing the latter that repairs would be carried out.

Taking the above into consideration, we are satisfied that the deceased was not under the apprehension of imminent death at the time he made the gifts to his four children, that the illness did not incapacitate him for the pursuit of his ordinary avocations and that although the illness continued for less than a year, the facts and circumstances as discussed above form sufficient length of time to remove or lessen from his mind the apprehension of immediate death.

In the circumstances, we allow the appeal with costs and set aside the judgment of the learned trial Judge. We hold that the gift by transfer of the 298 shares of the match factory to the four appellants was not caught by the doctrine of *Marz-ul-Maut* and is therefore valid under the Shariah laws according to the principles set out at the beginning of this judgment. We are satisfied that the three conditions required to validate a lawful gift made during the lifetime of the deceased are complied with.

The appellants are entitled to costs here and the Court below.

The deposits are to be returned to the appellants.

Appeal allowed.

Solicitors: *Wrigglesworth & Co.; Zain & Co.; C.H. Liew & Co.*

CHAN FOO MENG & 68 ORS. v. HUP SENG CO. LTD.

[O.C.J. (Mohamed Dzaiddin J.C.) March 24, 1981]

[Kuala Lumpur – Civil Suit No. 681 of 1963]

Contract – Sale and purchase of land – Whether defendant company purchased land as trustees of plaintiffs.

In this case the plaintiffs sought a declaration that the defendants are their trustees in respect of a piece of land ("the land") Lot 1995 held under Selangor Certificate of Title No. 13415, in the Mukim of Petaling, District of Kuala Lumpur. The plaintiffs alleged that the land was purchased by them under an agreement dated May 16, 1959, and should be subdivided accordingly. They asked the Court to order the defendants to execute and register a transfer of the land in favour of the plaintiffs. Alternatively, they sought a vesting order. All the original 69 plaintiffs lived on the land and paid ground rent for their respective plots to the registered proprietor, one Mrs. Brown, who decided to sell the land to these tenants. The price agreed between the tenants and her for the remaining portion of the land consisting of an area of 29 acres and 15 poles ("the remaining portion") was $58,000.00. On April 18, 1958, a sale agreement was executed between